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Federal Sentencing Guidelines: The Key to Corporate Integrity Or Death Blow to Any Corporation Guilty of Misconduct?

Under the Comprehensive Crime Control Act of 1984, Congress created the United States Sentencing Commission (hereinafter "the Sentencing Commission") as an independent agency within the judicial branch of the United States government.¹ The principal purpose of the Sentencing Commission is to "establish sentencing policies and practices for the federal criminal justice system that will assure the ends of justice by promulgating detailed guidelines prescribing the appropriate sentences for offenders convicted of federal crimes."² On May 1, 1991, the Sentencing Commission submitted to Congress the final draft of its guidelines³ for the sen-

1. 28 USC § 991 (1984). The Sentencing Commission was established under the authority of 28 USC § 991:

(a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one non-voting member. The President, after consultation . . . [with various legal representatives] . . . shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman . . .

(b) The purposes of the United States Sentencing Commission are to (1) establish sentencing policies and practices for the Federal criminal justice system that— (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentencing when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; and (2) develop means of measuring the degree to which the sentencing penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.

Comprehensive Crime Control Act of 1984, 28 USC § 991 (1984).

2. 18 USCA App 4, Ch 1, Part A, 1 (Supp 1991).

3. The guidelines are set forth at 56 Fed Reg 22786. The guidelines will be incorporated as Chapter 8 of Sentencing Guidelines for United States Courts, 18 USCA App 4, Ch 1, Part A, 1 (Supp 1991). United States Sentencing Commission, Amendment to the Sentencing Guidelines for United States Courts, 56 Fed Reg 22761, 22787 (1991). Within this article, the sentencing guidelines will be cited as "USSG §."

tencing of organizations.⁴ These new guidelines became effective on November 1, 1991.⁵ The guidelines are the result of three years of intense debate and the fourth draft of the guidelines presented by the Sentencing Commission.⁶

The United States Sentencing Commission has based the new guidelines on four premises: (1) organizations must remedy the harm caused by the wrongful act; (2) if the organization operates primarily for a criminal purpose, the organization must be divested of its assets; (3) the fine or penalty must be based upon the seriousness of the offense and the culpability of the organization, and; (4) probation may be imposed upon an organization where necessary.⁷

4. Sentencing of Organization 56 Fed Reg at 22786 (cited in note 3). According to the guidelines, an "organization" is defined as "a person other than an individual." 18 USC § 18 (1986, as amended). The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations. USSG Comment to § 8A1.1.

5. Duties of the Commission 28 USC § 994 (1984). According to the Comprehensive Crime Control Act of 1984, proposed guidelines submitted by the Sentencing Commission become effective automatically six months after their date of submission unless Congress passes an act amending the proposal:

The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

Id.

6. Robert J. Giuffra, Jr., *Can Corporations Learn to Live with the New Sentencing Guidelines?* Legal Backgrounder 1 (Wash Legal Found, June 7, 1991).

7. USSG Introductory Comment. The United States Sentencing Commission has specifically set forth these principles in the Introductory Comment to the guidelines:

First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making victims whole for the harm caused. Second, if the organization operated primarily for a criminal purpose or primarily by criminal means, the fine should be sufficiently high to divest the organization of all its assets. Third, the fine range for any other organization should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the highest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table. Culpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel and the organization's actions after an

The new guidelines will have serious effects upon corporations conducting business in the United States and counsel representing those corporations. In the event of a conviction for a corporate crime, the mandatory sentencing guidelines will be used to set the fine or penalty.⁸

The idea of bringing criminal charges against a corporation for its wrongful acts is not new.⁹ More than likely, corporations have been charged with criminal activity for as long as corporations themselves have existed. In the past, however, the punishment which has been imposed for a wrongful act has been minimal compared to the potential penalties which can be imposed under the new sentencing guidelines.¹⁰ For example, as recently as 1989, less than twenty percent of all convicted corporations paid any restitution whatsoever, and the average amount of restitution paid was less than \$50,000.¹¹ Similarly, in 1989, fifty percent of all fines were for less than \$30,000, and the average fine was only \$175,000.¹² Under the new sentencing guidelines, a corporation can now be ordered to pay restitution for the entire cost of the harm caused by the act and potential fines can run into the hundreds of millions of dollars.¹³

As evidenced by the Exxon Valdez oil spill in 1989, mishaps in today's corporate world can have far-reaching consequences. Therefore, a workable system is needed to correct the damage created by corporate misconduct. The sentencing guidelines are a new weapon at the disposal of federal law enforcement officials to keep corporate conduct in check.

offense has been committed. Fourth, probation is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct.

Id.

8. USSG § 8A1.2.

9. See, for example, *United States v Armour & Co.*, 168 F2d 342 (3d Cir 1948); *United States v American Radiator & Standard Sanitary Corp.*, 433 F2d 174 (3d Cir 1970); *United States v Hilton Hotels*, 467 F2d 1000 (9th Cir 1973).

10. Guiffra, Legal Backgrounder at 2 (cited in note 6).

11. Id.

12. Id. Although the new sentencing guidelines do not apply to environmental crimes, it is interesting to note the recent trend of the law in this area. In light of the Exxon Valdez oil spill in 1989 and several other environmental disasters, judges and prosecutors have been much more adamant in sentencing corporations guilty of environmental misbehavior. The Sentencing Commission is planning to review the applicability of the guidelines to environmental crimes in the near future. It should not be surprising if the sentencing guidelines are expanded into this realm by May 1, 1992. Id at 3.

13. USSG §§ 8B1.1 and 8C2.1 et seq.

Although the sentencing guidelines will dramatically affect the way a corporation conducts business, it is possible for a corporation to live harmoniously with the guidelines. However, because the guidelines present an entirely new approach to the sentencing of organizations, questions inevitably remain concerning how the guidelines will be applied in any given situation. This comment begins with a summary of the penalties which may be imposed under the sentencing guidelines. It continues with a discussion of the incentives available for those corporations which comply with the guidelines. Finally, this comment concludes by analyzing the desirability and potential inadequacies of the guidelines.

PENALTIES IMPOSED UNDER THE GUIDELINES

Under the new guidelines, a corporation convicted of criminal conduct may be penalized in one of four ways: restitution; fines; probation; or special assessments, forfeitures and costs.¹⁴ The restitution provisions of the guidelines require that a corporation take all appropriate steps to provide compensation to identifiable victims of the crime.¹⁵ The court may order restitution as part of the sentence under 18 USC §§ 3663-3664 or as a condition of probation.¹⁶ The purpose of such an order is to remedy the harm that has already occurred and to prevent any future harm from occurring.¹⁷ Additionally, community service may be ordered if the services will provide restitution.¹⁸

The restitution provisions of the new guidelines will be of greatest interest to the victims of the offense. The purpose of paying

14. See USSG §§ 8B1.1, 8C1.1, 8D1.1, 8E1.1.

15. USSG Introductory Comment to Part B. Identifiable victims of the crime can be compensated through a restitution order or an order of probation requiring restitution. *Id.* In the past, less than twenty percent of all convicted corporations paid any restitution, and the average amount of restitution was less than \$50,000. Guiffra, *Legal Backgrounder* at 2 (cited in note 6).

16. USSG §§ 8B1.1 and 8B1.2. The court will enter an order of restitution:

(1) [I]f such order is authorized under 18 USC §§ 3663-3664; or (2) if a restitution order would be authorized under 18 USC §§ 3663-3664, except for the fact that the offense of conviction is not an offense set forth in title 18, United States Code, or 49 USC 1472 (h),(i),(j), or (n), sentence the organization to probation with a condition requiring restitution.

USSG § 8B1.1.

17. USSG Commentary to § 8B1.2. The court may use its discretion in the creation of a remedial order: "If the magnitude of expected future harm can be reasonably estimated, the court may require the organization to create a trust fund sufficient to address that expected harm." USSG § 8B1.2.

18. USSG § 8B1.3.

restitution is to compensate the victim for the harm suffered.¹⁹ Through the restitution provisions, courts have at their disposal remedies similar to those available under tort law. Since restitution is ordered as part of a federal criminal prosecution, individual plaintiffs who would otherwise lack the resources to bring such a tort claim may now be made whole.²⁰

A corporation will most likely experience its greatest potential loss through the imposition of a fine.²¹ The sentencing guidelines require the court to apply a complicated formula in setting the corporate fine.²² The sentencing court must use two factors in setting the fine: a base fine and a multiplier.²³ Together, these two factors produce a "guideline fine range" from within which the court has discretion to select the precise fine to be imposed.²⁴

The sentencing court must first determine the base fine.²⁵ This is a measure of the seriousness of the offense.²⁶ The court selects the greater of: (1) an amount from the table which corresponds to the applicable "offense level" for the crime;²⁷ (2) the corporation's pecuniary gain from the offense; or (3) the pecuniary loss from the offense caused by the corporation, "to the extent the loss was caused intentionally, knowingly, or recklessly."²⁸

Once the base fine has been determined, the court must then

19. USSG Introductory Comment to Part B.

20. The restitution provisions most strongly reflect the first principle behind the guidelines: "The court must, whenever practicable, order the organization to remedy the harm caused by the offense." USSG Introductory Comment. For the other principles behind the guidelines, see note 7 and accompanying text.

21. USSG § 8C1.1 et seq. Without an effective corporate compliance program, corporations can expect to pay fines reaching into the hundreds of millions of dollars for any offense which results in a serious loss. *Id.* The sentencing guidelines require fines "as high or higher than the highest fines" ever imposed by judges. Guiffra, *Legal Backgrounder* at 2 (cited in note 6). By contrast, in 1989, fifty percent of fines were for less than \$30,000 and the average fine was for only \$175,000. *Id.*

22. USSG § 8C1.1 et seq.

23. USSG at §§ 8C2.4, 8C2.6.

24. USSG § 8C2.7.

25. USSG § 8C2.4.

26. USSG Commentary to § 8C2.4.

27. USSG § 8C2.4. The offense levels set forth in the sentencing guidelines provide for fines which range from a low of \$5,000 for crimes with an offense level of six or less, to a high of \$72,000,000 for any crime with an offense level of thirty-eight or more. *Id.* In determining the offense level of a corporation, the guidelines apply the applicable offense level as determined for certain individual crimes. USSG § 8C2.1. Offense levels generally correspond to the seriousness of the crime. See 18 USC Appendix, Ch 2.

28. USSG § 8C2.4. As a general rule, the amount of the sanction (restitution and fine) may not be less than the corporation's "profit" from the offense. Guiffra, *Legal Backgrounder* at 3 (cited in note 6).

apply a multiplier which is used to adjust the base fine depending upon the corporation's culpability score.²⁹ The culpability score is a measure of the corporation's culpability in committing and responding to the offense.³⁰ The court in essence will look at any aggravating or mitigating factors present in the case. Examples of aggravating factors are: (1) the participation in, condoning of, or tolerance of an offense by "high level personnel" or "substantial authority personnel" of the corporation or business unit in question; (2) a prior history of similar misconduct over the past ten years by such corporation; (3) a violation of a prior judicial or administrative order by the corporation; and (4) obstruction of justice by the corporation.³¹ Mitigation credit will be given for: (1) the maintenance of an effective compliance program to prevent and detect violations of the law; (2) the self-reporting of the offense to the authorities prior to "an imminent threat of detection"; (3) full cooperation by the corporation in the investigation of the offense; and (4) the corporation accepting responsibility for its criminal conduct.³²

The difference in treatment between a convicted corporation having a high culpability score, and that having a low score is great. A defendant receiving the lowest possible culpability score could have its fine reduced by ninety-five percent.³³ At the other end of the spectrum, a corporation receiving the highest possible culpability score could have its fine quadrupled.³⁴

A court may depart from the guidelines if the organization cannot and is not likely to be able to pay the required restitution and fine, or if the owners of a closely-held corporation have already been fined for the same offense.³⁵ A departure from the guidelines³⁶ is also permitted if the corporation offered substantial assis-

29. USSG §§ 8C2.5, 8C2.6. The multiplier to be applied ranges from a minimum of 0.05 to a maximum of 4.0. The multiplier to be applied is determined by the corporation's culpability score. In determining the corporation's culpability score, the court begins with a culpability score of five points and points are either added or subtracted according to the presence or absence of the factors listed in the accompanying text. *Id.* at § 8C2.5.

30. Guiffra, *Legal Backgrounder* at 3 (cited in note 6).

31. USSG § 8C2.5

32. *Id.*

33. USSG § 8C2.6.

34. *Id.*

35. USSG §§ 8C3.3, 8C3.4.

36. A departure from the guidelines may lead to a greater or lesser penalty depending upon the reason for departure. USSG Introductory Commentary preceeding § 8C4.1. The Commentary states: "Departures may be warranted if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into

tance to authorities or if the offense involved a threat to national security, the environment or a securities market, or if the offense involved bribery of a public official or the threat of death or bodily injury.³⁷

The sentencing guidelines also provide for placing a corporation on probation.³⁸ The guidelines set forth a number of conditions under which the sentencing court is required to do so.³⁹ As a general statement, it is almost certain that a corporation will be placed on probation, as a condition of its sentence, if it does not have an "effective" compliance program in effect.⁴⁰

The guidelines permit courts to impose any probationary conditions that "are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization,"⁴¹ so long as those conditions "involve only such deprivations

consideration by the Sentencing Commission." Id.

37. USSG at § 8C4.1 et seq. The Washington Legal Foundation indicates that the new sentencing guidelines will apply to about eighty percent of all federal offenses committed by a corporation. Guiffra, *Legal Backgrounder* at 3 (cited in note 6). However, the new sentencing guidelines will not apply to environmental crimes, export control or food and drug crimes. Id. Additionally, the guidelines do not address civil rights violations. USSG § 8C2.1.

38. USSG Part D.

39. USSG § 8D1.1. The court is required to place a corporation on probation:

(1) If such sentence is necessary to secure payment of restitution (§ 8B1.1), enforce a remedial order (§ 8D1.2), or ensure completion of community service (§ 8B1.3);

(2) If the organization is sentenced to pay a monetary penalty (e.g., restitution, fine, or special assessment); the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments;

(3) If, at the time of sentencing, an organization having 50 or more employees does not have an effective program to prevent and detect violations of law;

(4) If the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(5) If an individual within high-level personnel of the organization or the unit of the organization within which the instant offense was committed participated in the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal adjudication, and any part of the misconduct underlying the instant offense occurred after that adjudication;

(6) If such sentence is necessary to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct;

(7) If the sentence imposed upon the organization does not include a fine; or

(8) If necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. §3553(a)(2).

USSG § 8D1.1.

40. USSG § 8D1.1(3).

41. USSG § 8D1.3.

of liberty or property as are necessary to effect the purposes of the sentencing."⁴²

The Sentencing Commission has set forth in policy statements the possible conditions of probation, including (1) a requirement that the corporation take out newspaper and television advertisements publicizing the offense and any steps it plans to take to prevent a recurrence; (2) a requirement that the corporation develop and submit a compliance program to the court for its approval; (3) permitting a court-appointed probation officer to monitor the corporation's administration of the compliance program; or (4) a requirement that, if probation has been imposed to collect restitution or a fine, the court be notified of "any material adverse change in its business."⁴³

Finally, the sentencing guidelines also provide that a convicted corporation may be required to pay special assessments, forfeitures and costs.⁴⁴ For example, a corporation may be required to pay the costs of its own prosecution.⁴⁵ Similarly, for example, if the corporation was convicted under the Racketeer Influenced and Corrupt Organizations statute, the corporation would be required to forfeit the proceeds of any racketeering activity.⁴⁶

CORPORATE COMPLIANCE PROGRAMS

Although the new guidelines will have far reaching affects, it is possible for a corporation to live harmoniously with the guidelines. Like the proverbial donkey led about his daily task constantly chasing a carrot dangling in front of him, the Sentencing Commission has enticed corporations to become law-abiding citizens through the use of incentives.⁴⁷ As stated above, a corporation which has

42. *Id.* The guidelines also state that as a term of probation, the corporation shall not commit another federal, state, or local crime during the term of probation. USSG § 8D1.3(a). Additionally, if the crime committed is a felony, the court shall impose one of the following: "A fine, restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event, the court shall impose one or more other conditions set forth in 18 USC 3563(b)." USSG § 8D1.3(b).

43. Guiffra, Legal Backgrounder at 4 (cited in note 6).

44. USSG § 8E1.1

45. *Id.*

46. USSG § 8E1.2. It should be noted that if the corporation was originally organized for the purpose of conducting an illegal activity, the corporation may be divested of all its assets. USSG Introductory Comment.

47. Guiffra, Legal Backgrounder at 4 (cited in note 6). The Introductory Comment to the new guidelines states:

This chapter is designed so that the sanctions imposed upon organizations and their

taken steps to detect and prevent criminal activity may have its fine reduced by as much as ninety-five percent.⁴⁸ A corporation which has taken all steps to detect and prevent criminal conduct may also avoid prosecution entirely.⁴⁹

Because of the great variation in fines which may result through the application of the multiplier,⁵⁰ the clear objective for corporate counsel will be to assure that, should the corporation become the subject of a criminal investigation, the corporation is positioned to achieve the lowest possible culpability score.

A number of factors will affect the culpability score.⁵¹ Under the sentencing guidelines, culpability scoring is structured in a way such that the factors are interrelated. For instance, in a large corporation with over five thousand employees, five points will be added to the culpability score if high-level personnel were involved in the offense.⁵² Similarly, three points will be subtracted if the firm had an effective compliance program in place.⁵³ However, a rebuttable presumption exists that a compliance program is not effective if high-level personnel were involved in the offense. Thus, in a given situation, the presence of a properly functioning compliance program may lead to a culpability difference of eight points.⁵⁴

agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.

USSG Introductory Comment.

48. See note 33 and accompanying text.

49. See note 74 and accompanying text.

50. See notes 29-34 and accompanying text.

51. When calculating the culpability score, a corporation starts with five points. USSG § 8C2.5. If high-level personnel or substantial authority personnel are involved in the offense, i.e., they participated in, condoned, or were willfully ignorant of the offense, one to five points may be added. *Id.* The number of points to be added depends upon the number of employees in the corporation. *Id.* If the firm has a prior history of similar misconduct, two points are added. *Id.* If the offense involved a violation of a judicial order or condition of probation, two or one points are added respectively. *Id.* Finally, if the corporation willfully obstructed the investigation, prosecution or sentencing of the offense, three points are added. *Id.*

A valid corporate compliance program earns the corporation three mitigation points, self-reporting of the crime results in the subtraction of five points, co-operation with the investigation earns two points and acceptance of responsibility for the offense, one point. *Id.*

52. *Id.* High-level personnel will be involved in the offense if the individual was "willfully ignorant of the activity." *Id.*

53. *Id.*

54. A corporation starts with five points. *Id.* If a compliance program is not in place or it is deemed to be ineffective, three points will not be subtracted. *Id.* If high-level personnel were involved in the offense, five points are added. *Id.* Such a change in culpability scoring assumes that a properly functioning compliance program detects and prevents the activities of the high-level personnel.

When converted into the multiplier table, this could amount to a change in the potential fine of hundreds of millions of dollars.⁵⁵

Therefore, it should be obvious that the key to avoiding an extremely large fine under the new sentencing guidelines is to have in place an effective program to detect and prevent criminal conduct.⁵⁶ The guidelines state that the hallmark of an effective compliance program is that the organization exercise due diligence in seeking to prevent and detect criminal conduct.⁵⁷ Due diligence requires that the organization at a minimum take the following steps to prevent and detect criminal activity:

- (1) The organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct;
- (2) Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures;
- (3) The organization must have used due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should have known through the exercise of due diligence, had a propensity to engage in illegal activities;
- (4) The organization must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required;
- (5) The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution;
- (6) The standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense. Adequate discipline of individuals responsible for an offense is a necessary component of enforcement: however, the form of discipline that will be appropriate will be case specific;
- (7) After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its program

55. USSG §§ 8C2.4, 8C2.6.

56. USSG § 8A1.2 The guidelines define "an effective program to prevent and detect violations of law" as a program that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect the instant offense, by itself, does not mean that the program was not effective. *Id.*

57. USSG Comment 3(k) to § 8A1.2.

to prevent and detect violations of law.⁵⁸

Unfortunately, the guidelines themselves do not present much additional help in determining precisely what factors a corporate compliance program must contain.⁵⁹ One interest group has suggested that a compliance program is an effort to ensure, to the maximum extent possible, that an organization and its employees will meet the requirements of law.⁶⁰ It has also been suggested that such a program, once implemented, serves to raise the consciousness of employees as to ethical issues and assists employees in resolving problems in a responsible manner.⁶¹

The Washington Legal Foundation⁶² has suggested ten steps which should be considered when developing a compliance pro-

58. *Id.*

59. The guidelines do state:

The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are: (i) Size of the organization—The requisite degree of formality of a program to prevent and detect violations of law will vary with the size of the organization: The larger the organization, the more formal the program typically should be. A larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents. (ii) Likelihood that certain offenses may occur because of the nature of its business—If because of the nature of an organization's business there is substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses. For example, if an organization handles toxic substances, it must have established standards and procedures designed to ensure that those substances are properly handled at all times. If an organization employs sales personnel who have flexibility in setting prices, it must have established standards and procedures designed to prevent and detect price-fixing. If an organization employs sales personnel who have flexibility to represent the material characteristics of a product, it must have established standards and procedures designed to prevent fraud. (iii) Prior history of the organization—An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all steps to prevent such misconduct. An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.

USSG § 8A1.2. Comment 3(k)

60. Alan R. Yuspeh, *Developing a Corporate Compliance Program*, Legal Backgrounder 1, 2 (Wash Legal Found, March 29, 1991).

61. Yuspeh, Legal Backgrounder at 2 (cited in note 60).

62. The Washington Legal Foundation is a 501(C)(3) tax exempt organization and is American's largest pro-free enterprise public interest law and policy center. *Id.* at 1. The Legal Backgrounder is a series of original papers written and published by the Foundation's Legal Studies Division. *Id.* The Legal Studies Division of the Foundation is dedicated to expanding the pro-free enterprise legal idea base. It does this by conducting original research and writing and delivering a diverse array of publications to businessmen, academics and government officials. *Id.* at 4.

gram. These steps include: (1) the identification of risk areas;⁶³ (2) the development of a code of conduct;⁶⁴ (3) the development of a system for the distribution of the code of conduct throughout the corporation;⁶⁵ (4) the development of a training and orientation program;⁶⁶ (5) the institution of a hotline or ombudsman;⁶⁷ (6) communication with employees;⁶⁸ (7) coordination with internal audit capabilities;⁶⁹ (8) assignment of responsibilities thoughtfully within the corporation;⁷⁰ (9) incorporation of compliance concerns with performance reviews;⁷¹ and (10) emphasizing the key role of senior management.⁷²

ADDITIONAL INCENTIVES UNDER THE GUIDELINES

If a corporation has in place a program to detect and prevent criminal activity, the presence of this program may carry benefits in addition to merely mitigating the fine at the time of criminal sentencing. A well-planned compliance program may eliminate the conduct which creates the criminal violation in the first place.⁷³

63. *Id.* at 2. For a program to make any sense, the program must be structured to address the particular areas of potential wrongdoing within the corporation. It is useless for a securities firm to have an environmental policy for instance. Similarly, the larger and more complex a corporation, the more formal and extensive a program must be.

64. *Id.* The corporation must develop some statement as to the conduct it expects from its employees. *Id.*

65. *Id.* Generally, the program should be in writing and some formal distribution system should be in place to make employees aware of the expected standards. *Id.*

66. *Id.* The training and orientation programs should be tailored to the specific needs of a particular corporation. *Id.*

67. *Id.* at 3. A hotline or ombudsman is certainly critical in this area. A corporation will need to ensure that its employees can "whistle blow" on a corporation without the fear of retaliation. Due to the confidentiality concerns of the individual employee, a separate office would probably best handle such a task.

68. *Id.* Some sort of continuing education program should be implemented. *Id.*

69. *Id.* The Washington Legal Foundation suggests that this is an important aspect of any compliance program:

Historically, many of these departments have not reported at a sufficiently high level in an organization nor have they been adequately staffed to be effective. A part of any compliance program should be a review of the resources and activities of the internal audit function to make certain they are adequate.

Id.

70. *Id.* Large corporations will likely need separate officers or even departments to administer a compliance program. *Id.* Smaller organizations should be able to implement a compliance program merely by assigning additional tasks to existing employees. *Id.*

71. *Id.* Compliance is more likely if an appraisal is part of the employee's review. *Id.*

72. *Id.* For any program to succeed, senior managers of the organization must be committed to the program. *Id.*

73. Nancy A. Nord, "Sentencing Guidelines Up the Ante for Corporate Compliance Programs," *American Corporate Counsel Association Docket* 53 (Fall 1991).

Additionally, if a compliance program is in place before the commission of the alleged crime, the presence of the compliance program may be used to convince a prosecutor "to forego issuing an indictment."⁷⁴

Although the guidelines add a new weapon to the arsenal of the prosecutor when sentencing a corporation, the prosecutor must still prove beyond a reasonable doubt the necessary elements of any alleged crime during a trial. Prior to the promulgation of the Sentencing Guidelines, three circuit courts of appeal addressed the issue of whether a corporate compliance program can be considered when determining whether the corporation is guilty of the offense.⁷⁵

In the case of *United States v Basic Const. Co.*,⁷⁶ the Fourth Circuit held that a corporation's antitrust compliance policy was relevant in determining whether the employees were indeed acting for the benefit of the corporation.⁷⁷ The court said:

[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.⁷⁸

The court went on to explain that the existence of a compliance program may be admitted into evidence:

In the instant case, the district court properly allowed the jury to consider Basic's alleged antitrust compliance policy in determining whether the employees were acting for the benefit of the corporation. It also properly instructed [the jury] on the issue of intent in an antitrust prosecution, i.e., that corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent

74. Nord, *American Corporate Counsel Association Docket* at 53 (cited in note 73).

75. In these Circuits, the Second, Fourth and Ninth, the courts have addressed the issue of the use of the compliance program once the trial of the corporation has commenced. See notes 76-84 and accompanying text. Even if a compliance program is not introduced into evidence, the program may still be used to persuade a prosecutor not to file an indictment in the first place. Nord, *American Corporate Counsel Association Docket* at 53 (cited in note 73). It should be noted that because of the mandatory nature of the new guidelines, the guidelines will be used to sentence the corporation regardless of any other benefit which may accrue to a corporation having a program in place under the guidelines.

76. 711 F2d 571 (4th Cir 1983). The defendants in this case were charged with conspiring to rig the bidding of state road paving contracts in violation of the Sherman Act. *Basic*, 711 F2d at 572. The defendant corporation argued that in a criminal antitrust prosecution, intent must be proven and cannot be presumed. *Id.* The defendant also argued that the intent of the corporation had to be proven separately from that of any employee on trial. *Id.* at 573.

77. *Id.*

78. *Id.*

authority to make policy for the corporation.⁷⁹

The Ninth Circuit Court of Appeals has also permitted a jury to consider the presence of a compliance program when determining the liability of a corporation.⁸⁰ In the case of *United States v Beusch*,⁸¹ the defendant corporation appealed a misdemeanor conviction on the basis that a jury instruction which stated that the corporation may be liable for the acts of its agents was improper.⁸² The court said that such an instruction does not impose strict liability on the corporation:

Rather, it suggests that a corporation *may* be liable for acts of its employees done contrary to express instructions and policies, but that the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation. Merely stating or publishing such instructions and policies without diligently enforcing them is not enough to place the acts of an employee who violates them outside the scope of his employment.⁸³

Finally, the Second Circuit Court of Appeals addressed a similar issue but reached a different result in *United States v Twentieth Century Fox Film Corp.*⁸⁴ Here, the defendants were charged with violating a consent decree.⁸⁵ The corporation tried to defend the action by demonstrating that the corporation's compliance program prohibited its employees from engaging in such practices.⁸⁶

79. *Id.* The trial court admitted evidence of the compliance policy to show whether the employee was acting for the benefit of the corporation at the time of committing the offense. *Id.* at 572. Basic argued that the evidence should have been used to show whether the company had the "requisite intent" to commit the crime. *Id.* The court limited the use of the evidence for the former purpose. *Id.* at 573.

80. *United States v Beusch*, 596 F2d 871 (9th Cir 1979).

81. 596 F2d 871 (9th Cir 1979). The defendants, a corporate foreign currency exchange dealer and the responsible corporate officer, were convicted of misdemeanor violations of the Bank Secrecy Act. *Beusch*, 596 F2d at 873.

82. *Id.* at 877. The particular jury instruction in question read: "A corporation may be responsible for the acts of its agents done or made within the scope of its authority, even though the agent's conduct may be contrary to the corporation's actual instruction or contrary to the corporation's stated policies." *Id.*

83. *Id.* at 878. The court stated that it is a question of fact as to whether measures taken to enforce corporate policy in an area will adequately insulate the corporation from liability. *Id.*

84. 882 F2d 656 (2d Cir 1989), cert denied, 493 US 1021 (1990). The film studio and one of its employees were held in contempt for violating provisions of an antitrust consent decree. *Fox*, 882 F2d at 657. As a result of a consent decree dating from the 1950's, film studios are prohibited from "block booking" films. *Id.* A studio block-books a film when the studio conditions the release of a choice first run film upon the licensing of other films usually far less popular. *Id.*

85. *Id.* at 658.

86. *Id.* at 660. *Fox* argued that even if its branch manager violated the consent decree,

However, the court would not accept the argument:

We agree with the district court that Fox's compliance program, however, extensive, does not immunize the corporation from liability when its employees, acting within the scope of their authority, fail to comply with the law and the consent decree. It is settled law that a corporation may be held criminally responsible for antitrust violations committed by its employees or agents acting within the scope of their authority.⁸⁷

In this opinion, the Second Circuit cited what would appear to be the contradictory authority of the Fourth Circuit's opinion in *Basic Const. Co.* It appears, however, that all three of the above cases can be reconciled by analyzing the prohibitions of the courts. The Second Circuit in *Twentieth Century Fox* stated that no matter how extensive a compliance program, its presence will not relieve the corporation of liability.⁸⁸ The Fourth and the Ninth Circuits stated that a compliance program may be used to show that the employee was not acting as an agent of the corporation performing activities for the benefit of the corporation at the time the criminal activity was committed.⁸⁹ In the Fourth and Ninth Circuits, the mere presence of a compliance program does not necessarily relieve the corporation from liability. Rather these circuits used evidence of the compliance programs to show that the employee was not acting as an agent of the corporation at the time the offense was committed.⁹⁰ Presumably, it could be argued that a corporation in the Second Circuit will also be relieved from liability if it can show that the criminal act was outside the agent's authority and the act was not performed for the benefit of the corporation.⁹¹

It should be noted that the issue of whether a court will admit evidence of a compliance program into the record to determine the criminal culpability of a corporation, must not be confused with the use of the compliance program as a mitigation factor during

the violation was not willful in view of the extensive program Fox adopted to encourage its employees to comply with the decree. *Id.*

87. *Id.*

88. *Id.*

89. See *Basic*, 711 F2d at 573; *Beusch*, 596 F2d at 878.

90. See note 87 and accompanying text.

91. When convicting a corporation of criminal fault, it is generally necessary to show that the crime was committed by an agent of the corporation acting within the agent's authority. *Basic*, 711 F2d at 573. The Second Circuit states that no matter how extensive a compliance program, the corporation cannot be relieved of liability. *Twentieth Century Fox*, 882 F2d at 660. However, if the agent was not acting as an agent of the corporation, a nexus is lacking between the person committing the criminal act and the corporation.

sentencing. Under the sentencing guidelines, consideration of a compliance program is mandatory.⁹² However, the two issues are closely related. If a corporation has an effective compliance program in place, chances are much better that the corporation is not liable for the offense. If the corporation has taken all reasonable steps to detect and prevent criminal conduct, it is easier for the corporation to show that the person who committed the offense was acting outside the scope of corporate authority.

DESIREABILITY AND POTENTIAL INADEQUACY

Under the new sentencing guidelines, a corporation may face fines and penalties reaching into the hundreds of millions of dollars.⁹³ Additionally, the implementation of a compliance program will create added expenses for a corporation. Therefore, the business community will not welcome the new guidelines if for no other reason than the fact that the guidelines will increase the cost of doing business.⁹⁴ Although the business community would have preferred non-binding guidelines, the guidelines could have been more stringent.⁹⁵ At least under the current guidelines, a corporation can avoid a great amount of any fine by following the mitigating steps set forth in the guidelines.⁹⁶ Therefore, it is possible for a corporation to live in harmony with the new guidelines.

One is to question, however, whether the guidelines are generally desirable. In answering this question, I make a general assumption that a modern corporation must show responsibility for its actions. Additionally, it is necessary to look to the mission of the Sentencing Commission and the purposes behind the guidelines.

The statutory mission of the Sentencing Commission, as set forth under the Comprehensive Crime Control Act of 1984, was to enact guidelines which assisted in furthering "the basic purposes of

92. USSG § 8A1.1 The guidelines state: "This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor offenses." *Id.*

93. USSG §§ 8B1.1 and 8C1.1 et seq. For discussion of these provisions, see notes 21-34 and accompanying text.

94. Giuffra, *Legal Backgrounder* at 4 (cited in note 6).

95. *Id.* Both the Department of Justice and certain special interest groups have voiced an opinion that the guidelines are too generous. *Id.*

96. USSG § 8C2.5. The guidelines, which became effective on November 1, 1991, have alleviated one major concern with earlier drafts: "... the [Sentencing] Commission's emphasis in setting fine levels based on the level of involvement of management in the offense makes it less likely that a single misadventure by an unauthorized low-level employee could threaten a firm with multimillion dollar fines. . ." Giuffra, *Legal Backgrounder* at 4 (cited in note 6).

criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender."⁹⁷ Additionally, the policy statement issued along with the enactment of guidelines for the sentencing of individuals states that the basic objective of those guidelines was "to enhance the ability of the criminal justice system to reduce crime through an effective, sentencing system."⁹⁸ Congress sought to achieve this objective through "honesty, uniformity and proportionality in the sentencing system."⁹⁹

Since the new guidelines will merely complete another chapter of a complete system of criminal sentencing, it is interesting to compare the new guidelines in light of this previously stated purpose. The Introductory Comment to the new guidelines states:

This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.¹⁰⁰

The guidelines attempt to achieve these goals through the principles set forth at the beginning of this comment.¹⁰¹

The penalties imposed under the guidelines have been set at a level significantly high to reach the attention of corporate executives. Whereas the penalties imposed before the implementation of the guidelines were trivial by comparison, suddenly, a significant portion of a corporation's assets may be threatened by a criminal offense. The significant penalties imposed will force a corporation to become responsible for its actions. Previously, the cost of any penalty would likely be dismissed as the mere cost of doing business. Thus, the guidelines as structured will serve their intended

97. 18 USC Appendix Ch 1, 2.

98. 18 USC Appendix Ch 1, 3.

99. *Id.* In explaining these objectives, the policy statement states:

Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arises out of the present sentencing system which requires a judge to impose an indeterminate sentence that is automatically reduced in most cases by 'good time' credits. In addition, the parole commission is permitted to determine how much of the remainder of any prison sentence an offender actually will serve . . . Second, Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by differed Federal courts for similar criminal conduct by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity.

Id.

100. USSG § Introductory Comment.

101. See note 7.

purpose. In this light, the new guidelines are very desirable.

One publication has suggested, however, that the sentencing guidelines will clearly conflict with traditional white-collar defense techniques and will cause changes in corporate behavior to increase compliance.¹⁰² The sentencing guidelines require a radical departure in the way that an attorney will present a corporate defense.

When conducting the traditional defense of a corporation, counsel for the corporation focused first on whether the potential violations should be disclosed at all.¹⁰³ Similarly, if the government was already conducting an investigation, counsel usually attempted to persuade the government that the corporation should not be charged.¹⁰⁴ Because fines in the past were minimal compared to those set forth under the sentencing guidelines, a corporation often entered a guilty plea to the offense and no prosecution of the individuals involved in the offense occurred.¹⁰⁵ Ambiguity, coupled with "the absence of adequate decisional guidelines in a discretionary system of judicial sentencing, [gave] defense attorneys a central role in determining the type and length of sentence in white-collar cases."¹⁰⁶

The traditional techniques, however, may prove detrimental under the sentencing guidelines:

Under the Guidelines, the traditional strategies may be harmful or even impossible. The factors involved in calculating the culpability score place a premium on cooperation with the government and therefore may put the organization at odds with the interests of its employees.¹⁰⁷ Similarly, advocacy at sentencing, is of less utility because judges will have much less

102. Thomas E. Holliday, John H. Sturc and Brian E. Casey, "Corporate Criminal Liability; Tilting the Balance: The Effect of the Sentencing Guidelines on Organizational Defendants," *Insights* 2 Prentice Hall Law & Business (August 8, 1991).

103. Holliday, Sturc and Casey, *Insights* at 6 (cited in note 102).

104. Id. Counsel was inclined to present the facts in a light most favorable to the corporation. Id.

105. Id. Under the traditional defense, if a guilty plea was entered, the plea was often followed by a "second period of intensive advocacy—at the time of sentencing." Id.

106. Id, citing Kenneth Mann, *Defending White Collar Crime* at 13 (Yale Univ. Press 1985). When sentencing a corporation, the court would weigh "the nature of the offense, . . . the role of the defendant in the offense, . . . the defendant's background" and "the appropriateness of the sentence." Holliday, Sturc and Casey, *Insights* at 6 (cited in note 102).

107. One must question how cooperative an individual will be with a government investigation when the investigation may disclose facts which also convict the individual. Thus, a possible Fifth Amendment self-incrimination challenge may exist for those individuals charged under the sentencing guidelines. However, the guidelines do not require that an individual testify against his own interest, but this failure to testify may be viewed as a failure to cooperate in an investigation thus raising the culpability score and increasing the fine.

discretion.¹⁰⁸

Thus, the guidelines require that if a potential offense occurs, counsel should quickly investigate the facts before they come to the attention of the government so that the entity may make an intelligent decision regarding the nature of the possible offense.¹⁰⁹ Corporate counsel must take all actions which will reduce the mitigation score.¹¹⁰ It has been suggested that if counsel can determine that "substantial authority personnel" were not involved in the offense, then the sentencing guidelines strongly point toward voluntary disclosure of the problem to authorities.¹¹¹ Conversely, corporations that impede the investigation or prosecution of an offense will be penalized through the implementation of a higher culpability score.¹¹² Of special concern, the guidelines may also penalize entities which remain loyal to high-level employees, thus, conflict problems may emerge at an early stage in an investigation.¹¹³

Commentators have also suggested that the adversarial role of counsel will change:

Second, much of counsel's focus will shift from an adversarial role to shaping the charging decision. In view of the constraints on the exercise of judicial discretion, efforts to reduce the base offense level through negotiations with the government over the nature of the offenses charged and their alleged economic effect are crucial to the determination of the base fine and the starting point for any sentence. Because many regulatory matters . . . may be resolved on either a civil or criminal basis, these decisions must be made even when no criminal investigation has begun. Thus, the Guidelines further encourage efforts towards a regulatory resolution.¹¹⁴

Finally, factual litigation will become of increased significance. Since factual differences can lead to a change in the applicability of the culpability factors, a fear has been expressed that sentencing hearings may become mini-trials concerning the quality of the organization's conduct and the scope of the economic effect of the crime.¹¹⁵ "Since the sentences will be based upon judicial findings that may be subject to appeal, sentencing hearings will be more

108. Holliday, Sturc and Casey, *Insights* at 6 (cited in note 102).

109. *Id.* Early investigation will enable the corporation to self-report the offense thus enabling the corporation to achieve a more favorable culpability score. USSG § 8C2.5.

110. Holliday, Sturc & Casey, *Insights* at 6 (cited in note 102).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

extended and complex."¹¹⁶

Counsel representing a corporation may be placed in a difficult situation. The attorney is ethically obligated to provide the best defense possible for a corporation charged with criminal conduct. If at all possible, the attorney should attempt to have the indictment discharged without prosecution. Under the new guidelines, however, such a strategy creates a conflict of interest because the corporation runs the possibility of adding to the culpability score for lack of cooperation.

Similarly, culpability scoring is affected if the corporation self-reported the offense. Thus, the potential exists that a corporation which self-reports the offense and one convicted after a trial will be sentenced to different penalties. This possibility raises issues under the Sixth Amendment's guarantee of trial by jury.

There are other miscellaneous concerns regarding the guidelines. For instance, due to the elaborate restitution provisions available under the guidelines, one is to question whether other tort remedies may not have been better suited for such purposes. Additionally, since the imposition of the fines imposed under the guidelines are mandatory, it is uncertain if the plea bargaining system upon which our criminal system so strongly depends will be affected. Therefore, from the standpoint of the defense attorney, the guidelines present a number of potential inadequacies.

CONCLUSION

More than any recent statute, the sentencing guidelines may profoundly affect corporate behavior. The sentencing guidelines became effective on November 1, 1991. At this point, it is difficult to tell exactly how vigorously courts will use the guidelines in sentencing corporations guilty of crimes. It should be noted that even though imposition of the guidelines is mandatory, the sentencing court maintains some discretion as to the sentence imposed. The guidelines merely present a range of fines.

It remains to be seen whether the guidelines themselves will withstand constitutional scrutiny. The Sentencing Commission passed guidelines recently for the sentencing of individuals.¹¹⁷ These guidelines were challenged in *Mistretta v United States*.¹¹⁸ Here the United States Supreme Court upheld the placing of the

116. *Id.*

117. 18 USC Appx Ch. 1 et seq. (1987).

118. 488 US 361, 109 S Ct 647 (1989).

Sentencing Commission within the judicial branch of government.¹¹⁹ However, in *Mistretta*, the Court left open the possibility that a challenge could be based upon a separation of powers argument.¹²⁰ The Sentencing Commission consists of seven voting members and one non-voting member. The voting members are members of the judiciary. Interestingly, the non-voting member is a member of the Attorney General's office, a department of the executive branch. Whether the influence presented by the non-voting member is sufficient to hold the sentencing guidelines unconstitutional remains to be seen.

The deterrent effect of the guidelines will serve a valuable purpose in preventing corporate misconduct. However, a number of questions remain unanswered about the new guidelines. For instance, to what extent must counsel defending a corporation revise defense strategies. Additionally, it remains to be seen if certain individual provisions of the guidelines will withstand constitutional scrutiny.

It is unmistakable, however, that courts and prosecutors have in their possession a powerful new weapon to combat corporate crime. In today's trying economic times, corporate executives will inevitably worry about an overly aggressive prosecutor who presses for the glamorous sentence. If the guidelines are applied indiscriminately, the possibility exists for financial losses as never before seen. One can only hope that judges and prosecutors use restraint until the effectiveness of the new weapon is tested.

Eric J. Zagrocki

119. *Minstretta*, 109 S Ct at 667.

120. Paul D. Kamenas, *New Corporate Sentencing Guidelines May Be Unconstitutional and Should Be Challenged*, Legal Op Letter 1, 2 (Wash Legal Found, Oct 25, 1991).

